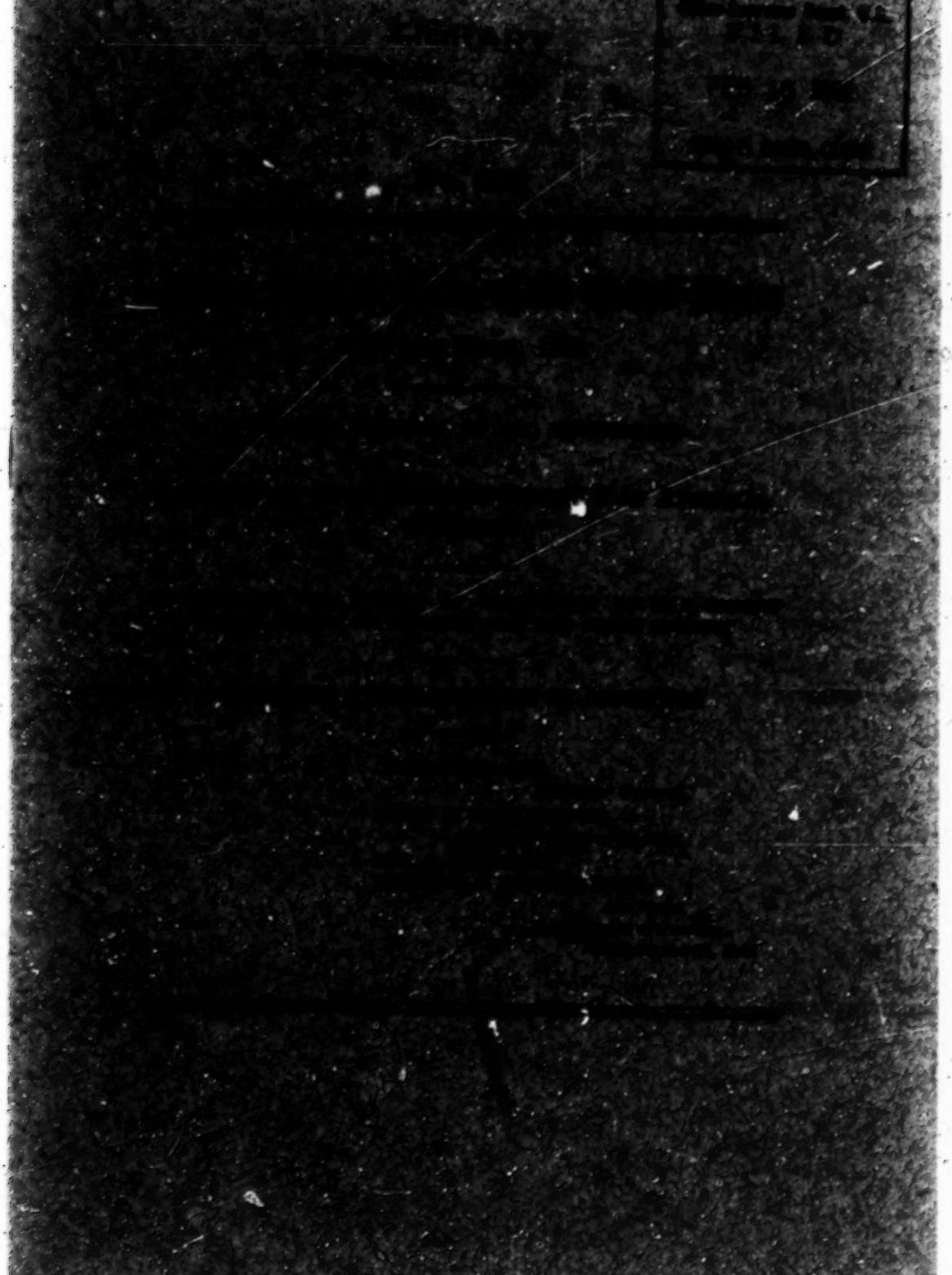

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CITATIONS

Cases:

Enochs v. *Williams Packing & Navigation Co., Inc.*, 291 F. 2d 402, writ of certiorari granted this term, No. 493 — 5

Miller v. *Nut Margarine Co.*, 284 U.S. 498 — 4, 5

New Hampshire Fire Ins. Co. v. *Scanlon*, 362 U.S. 404 — 3

Wilmette Park District v. *Campbell*, 338 U.S. 411 — 4

Statutes:

Internal Revenue Code of 1939:

Sec. 1718 (26 U.S.C. 1952 ed., Sec. 1718) — 2, 8

Sec. 3465 (26 U.S.C. 1952 ed., Sec. 3465) — 2

Sec. 3467 (26 U.S.C. 1952 ed., Sec. 3467) — 3, 8

Internal Revenue Code of 1954:

Sec. 4251 (26 U.S.C. 1958 ed., Sec. 4251) — 2

Sec. 4291 (26 U.S.C. 1958 ed., Sec. 4291) — 2, 3, 7, 8

Sec. 6404 (26 U.S.C. 1958 ed., Sec. 6404) — 2, 7

Sec. 6672 (26 U.S.C. 1958 ed., Sec. 6672) — 2, 7, 8

Sec. 7421 (26 U.S.C. 1958 ed., Sec. 7421) — 2, 3, 8

Sec. 7422 (26 U.S.C. 1958 ed., Sec. 7422) — 2, 3, 8

28 U.S.C. 2201 — 3

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 672

JOSEPH PORETTO, ET AL., PETITIONERS

v.

CHESTER A. USRY, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The statement of reasons filed by the district court (Pet. App. 7a) is unreported. The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 295 F. 2d 499.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1961. The petition for a writ of certiorari was filed on January 18, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the taxpayers are entitled to litigate the merits of a tax assessment through a petition for an order to the Director to show cause why the a ss-

ment should not be abated or suppressed where they failed to show that payment of the assessment would create any hardship and where that payment has now been made.

STATUTES INVOLVED

Sections 4291, 6404(a), 6672, 7421(a) and 7422 (a) and (b) of the Internal Revenue Code of 1954 are set forth in Appendix B, *infra*.

STATEMENT

Joseph Poretto and Joseph Marcello, Jr. (hereinafter referred to as taxpayers), operate a business under the name and style of Nola Printing Company at 530 Iris Avenue, Jefferson Parish, Louisiana (R. 2). On July 22, 1960, taxpayers were notified of an assessment against them by the District Director of Internal Revenue in the amount of $58,979.96. The assessment was made under the penalty provision of Section 6672 of the Internal Revenue Code of 1954 (Section 1718(c) of the 1939 Code) on the determination of the District Director that taxpayers' business constituted a communication facility subject to the provisions of Section 4251 of the 1954 Code and its precursor, Section 3465 of the 1939 Code, and that taxpayers had willfully failed to collect excise taxes for several taxable years ending February 28, 1954, through December 31, 1958, as required by Section 4291 of the 1954 Code and Section 3467(b) of the 1939 Code (R. 2).

The taxpayers allege that a claim for abatement (Pet. App. 17a) was filed unsuccessfully with the Director.

On August 5, 1960, taxpayers filed a petition with the District Court for the Eastern District of Louisiana for the issuance of an order to the District Director to show cause why the assessment should not be abated and suppressed, alleging various wrongful acts by the latter and challenging the factual basis for the assessment (R. 2–6).

On September 16, 1960, the Director filed a motion to dismiss the petition (R. 8–9) on the ground that the district court had no jurisdiction to entertain such a proceeding (1) because it was summary in nature and contrary to the rule announced in *New Hampshire Fire Ins. Co.* v. *Scanlon*, 362 U.S. 404; (2) because there was an adequate remedy at law under Section 7422 of the Internal Revenue Code of 1954; and (3) because maintenance of the action was barred by Section 7421 of the Internal Revenue Code of 1954 and by 28 U.S.C. 2201. This motion was granted by order of the district court dated October 7, 1960 (Pet. App. 7a–8a).

The taxpayers noted an appeal on October 28, 1960. On December 14, 1960, during the pendency of the appeal, the taxpayers paid in full the assessment in question (Affidavit of Vernon R. Kennedy, Chief, Collection Division, New Orleans District Office of Internal Revenue, Appendix A, *infra*).[1] The court of appeals affirmed the order (Pet. App. 1a–6a).

ARGUMENT

The statutory remedy for challenging a tax assessment which the taxpayer believes illegal or excessive

[1] A copy of this affidavit was filed as an appendix to the Director's brief in the court of appeals.

is by a refund suit, after the tax has been paid.[2] As held by the court below (Pet. App. 3a), it is clear that taxpayers will be able to test the merits of the tax here in question in a suit for refund.[3] See *Wilmette Park District* v. *Campbell*, 338 U.S. 411.

In rare instances the courts have entertained suits for equitable relief prior to payment. See *Miller* v. *Nut Margarine Co.*, 284 U.S. 498, 509, where the Court

> recognize[d] the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector. * * *

In a careful opinion, the court below has shown the inapplicability of the principle of that decision, stressing that in fact the taxpayers have not shown that the payment of the assessment would create any hardship at all (Pet. App. 5a–6a).[4]

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[2] An alternative remedy by way of petition to the Tax Court, prior to payment, is provided with respect to income, gift and estate taxes, none of which are here involved.

[3] The instant taxpayers have consistently conceded their ability to pay the tax and in fact did pay it during the pendency of their appeal (Appendix A, *infra*).

[4] In *Enochs* v. *Williams Packing & Navigation Co., Inc.*, 291 F. 2d 402, writ of certiorari granted this Term, No. 493, a majority of a different panel of the court below held that all of the requirements of *Miller* v. *Nut Margarine Co.* were met by the proof and the findings of the district court. The pendency of *Williams Packing* offers no reason for granting review here or for holding this case pending its disposition. In *Williams Packing* the district court found that a levy upon the assets "would have wrecked the corporation and thrown

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys.

FEBRUARY 1962.

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it into bankruptcy as it did not have and does not have assets with which to pay the taxes and not sufficient assets with which it could have negotiated a loan to pay the tax" (291 F. 2d at 406). No such circumstances were claimed or found to exist here. On the contrary, following denial of their petition by the district court, taxpayers paid the assessments. The distinction between the cases is underscored by the fact that Judge Cameron, the author of the *Williams Packing* opinion, concurred in the result in the instant case.

APPENDIX A

Affidavit of Vernon R. Kennedy

State of Louisiana, *Parish of Orleans.*

Before me, M. Hepburn Many, a Notary Public, duly commissioned and qualified in and for the State of Louisiana, Parish of Orleans, and residing therein.

Personally came and appeared: Vernon R. Kennedy, a person of full age, who, being first duly sworn, did depose and say:

That he is the Chief of the Collection Division of the Internal Revenue Service, New Orleans District, and as such has general supervision over the collection of tax revenues for the United States of America in the said New Orleans District.

That Account No. July/60-546500, in the name of Joseph Poretto and Joseph Marcello, Jr., d/b/a Nola News, P.O. Box 10124, New Orleans 21, Louisiana, for excise taxes for the period 2/28/54 through 12/31/58, plus interest and costs, has been paid in full by the taxpayers on December 14, 1960, by a certified check in the sum of $60,376.11, as will be shown by reference to the certificate of assessments and payments, dated January 16, 1961, annexed hereto and paraphed "Ne Varietur" by me, Notary, for identification herewith.

(Signed) Vernon R. Kennedy
Vernon R. Kennedy.

Sworn to and subscribed before me, this 19th day of January, 1961.

(Signed) M. Hepburn Many
M. Hepburn Many—*Notary Public.*

APPENDIX B

Internal Revenue Code of 1954 (26 U.S.C. 1958 ed.):

SEC. 4291 [as amended by Sec. 4(c), Act of July 25, 1956, c. 725, 70 Stat. 644]. CASES WHERE PERSONS RECEIVING PAYMENT MUST COLLECT TAX.

Except as provided in section 4264(a), every person receiving any payment for facilities or services on which a tax is imposed upon the payor thereof under this chapter shall collect the amount of the tax from the person making such payment. For the purpose of this section every club or organization having life members shall collect the tax imposed on life memberships by section 4241.

SEC. 6404. ABATEMENTS.

(a) *General Rule.*—The secretary or his delegate is authorized to abate the unpaid portion of the assessment of any tax or any liability in respect thereof, which—

(1) is excessive in amount, or

(2) is assessed after the expiration of the period of limitation properly applicable thereto, or

(3) is erroneously or illegally assessed.

* * * * * *

SEC. 6672. FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO EVADE OR DEFEAT TAX.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212 (a) and (c) and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * * * *

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

(b) *Protest or Duress.*—Such suit or proceeding may be maintained whether or not such tax, penalty or sum has been paid under protest or duress.

* * * * * *

The provisions of Sections 3467(b) and 1718(c) of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Secs. 3467 and 1718) are substantially similar to the provisions of Sections 4291 and 6672 of the 1954 Code, respectively, set out above.